TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 106

THE CITY OF SHREVEPORT, PLAINTIFF IN ERROR,

vs.

BENJAMIN JACOBS AND JOSEPH B. SMITH, AS JACOBS & SMITH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 12, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 377.

THE CITY OF SHREVEPORT, PLAINTIFF IN ERROR,

vs.

BENJAMIN JACOBS AND JOSEPH B. SMITH, AS JACOBS & SMITH.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, FEBRUARY 7, 1888.

a *Petition.*

In United States Circuit Court, Western District of Louisiana.

JACOBS and SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1.

1 To the honorable the circuit court of the United States for the fifth circuit and western district of Louisiana :

The petition of Benjamin Jacobs and of Joseph B. Smith, residents of Shreveport, Louisiana, with respect represents that the city of Shreveport, a municipal corporation established by the State of Louisiana, situated in the parish of Caddo, in said State of Louisiana and within said western district, is justly indebted to petitioner- in the sum of forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars, with five per cent. per annum interest from Nov'r 19th, A. D. 1871 (as shown by itemized statement hereto annexed as part hereof, marked "A"), for this, viz :

On the 3rd day of May, A. D. 1871, Benjamin Jacobs and Joseph B. Smith entered into a written contract, an authentic copy of which is hereto annexed and made part hereof for certainty, marked " B," whereby said Jacobs & Smith, on the one part, agreed and bound themselves to macadamize Commerce street, of said city, from the westerly side of Texas street to eastern side of Cotton street,

2 according to certain plans & specifications adopted by said city, and said city agreed and bound itself to pay for said work the sum and price of five $\frac{40}{100}$ dollars for each square yard of macadamizing and sixty-five cents per cubic yard for grading and putting the road-bed in proper condition. Petitioners aver that said contract was entered into by the mayor & trustees of said city under authority of the laws of the State of Louisiana relative to said corporation, and particularly act No. 109 of the General Assembly of said State, session of year A. D. 1869, entitled "An act granting further powers to the mayor & trustees of the city of Shreveport," approved March 9th, A. D. 1869, and that previous to entering into said contract all the formalities and requisites of law had *had* been fully complied with.

Petitioners aver that it was understood and so expressed in said contract that for said work payment would be made by said city and by owners of property fronting on Commerce street in proportion fixed by said act No. 109, but that by their said contract the city obligated itself to pay or cause to be paid the entire sum which might become due to petitioners for work done under said contract.

3 Petitioners allege that they faithfully and fully complied with their obligations under said contract ; that the work as done by them was duly inspected and received by said city on or about the 19th day of November, A. D. 1871 ; that the cost of same at prices fixed by said contract amounted to the sum of ninety-eight

thousand one hundred and ninety-two $\frac{49}{100}$ dollars, in which amount said city thereupon became indebted to petitioner-.

That the sum of thirteen thousand four hundred and seventy-six $\frac{32}{100}$ dollars was paid thereon by owners of property fronting on Commerce street, and that warrant No. 82, for unpaid tax on Commerce street, amounting to three thousand two hundred and thirty-five $\frac{25}{100}$ dollars, was also received by petitioners, leaving an indebtedness to them on part of said city under said contract amounting to eighty-one thousand four hundred and eighty-six $\frac{92}{100}$ dollars.

Petitioners aver that by the terms of their said contract with said city the city promised and obligated itself to pay the amount of its indebtedness arising thereunder out of funds realized from the collection of wharfage dues to be received by petitioners when
4 paid by or collected from steamboats at the wharves of Shreveport, until the entire amount of such indebtedness under said contract was fully paid.

That the city collected and paid over to them such wharfage dues up to the 20th December, A. D. 1878, amounting in the aggregate to the sum of thirty-four thousand and fourteen $\frac{61}{100}$ dollars, as shown by itemized statement hereinbefore referred to, annexed & marked "A," leaving balance due to petitioners by said city the amount hereinbefore claimed, viz., forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars.

Petitioners allege that since the 20th day of December, A. D. 1878, steamboats have arrived at the port of Shreveport from time to time up to present date, landed at the wharves of said city, and became thereby indebted for wharfage dues, collectable from such steamboats, their masters and owners, amounting in the aggregate to a large sum, say twelve thousand dollars, which should have been collected and paid over to petitioners by said city, but your petitioners aver that since the 20th Dec'r, A. D. 1878, said city has failed, neglected, and refused to collect any wharfage dues from steamboats landing at its wharves, and has failed to pay petitioners the
5 amount due them under said contract or any part thereof.

That on the 15th February, A. D. 1879, and on sundry days before and since said date, petitioners made amicable demand on said city to comply with its obligations under said contract by collecting and paying over to petitioners said wharfage dues, which said demands were by said city utterly disregarded.

Petitioners allege that in consequence of the neglect and refusal of said city to collect and pay over to them said wharfage, and by its default in complying with the terms of the said contract, the entire balance due thereunder, viz., said sum of forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars, with interest, as hereinbefore claimed, became due by and exigible from said city.

Petitioners allege amicable demand in vain.

They allege further that the law of the State of Louisiana, so far as same had any bearing on or relation to the said contract between them and said city and to the rights and obligations therefrom resulting, was by operation of law impliedly part of said contract, and there was an implied contract between said city and petitioners that, in event of failure on part of either of the contracting parties

6 to comply with the terms of said contract, the obligations resulting from and under said contract might be judicially enforced, and that under provisions of the law of Louisiana existing at date of said contract petitioners had adequate remedies for the enforcement of their rights thereunder.

But petitioners allege that article 208 of the constitution of the State of Louisiana, adopted July 23rd, A. D. 1879, and ratified by the people of said State on the first Tuesday of the month of Dec'b'r, A. D. 1879, has impaired the obligation of said contract by depriving your petitioners of all remedies for the enforcement of same, in this, viz., by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

Petitioners represent that the assessed value of all property subject to tax by said city is one million eight hundred & fifty-three thousand eight hundred & twenty dollars; that the tax thereon, at rate of ten mills on the dollar, amounts to the sum of eighteen thousand five hundred & thirty-eight & $\frac{20}{100}$ —; that the amount which the city is authorized to levy for license tax on trades, professions, and occupation does not exceed for any one year the sum of seventy-five hundred dollars.

7 That said city has no property which can be seized under execution, and no revenues except such as are derived from taxation; that the entire revenues of said city for any one year do not exceed the sum of thirty-one thousand dollars, an amount not more than sufficient for its alimony, and which must be appropriated for that purpose, and in consequence of said constitutional limitation, if same be valid and operative, no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

Petitioners allege that article 208, so far as same limits municipal taxation, is as to them null and void, because it violates the tenth section of the first article of the Constitution of the United States, which prohibits the State of Louisiana (with all other States) from passing any law impairing the obligation of contracts.

That they are entitled to have said article 208 of the constitution of the State of Louisiana declared null and void, so that they may have some remedy by means of which to compel said city to pay its indebtedness to them; that the case herein presented arises under the Constitution of the United States, and that your hon'l- court has jurisdiction thereof.

8 The premises considered, petitioners pray that the City of Shreveport be cited to answer hereto; that, after all legal notices and delays, they have judgment against said city declaring said article 208 of the constitution of the State of Louisiana violative of the Constitution of the United States, null and void, and condemning said city to pay to petitioners said sum of forty-seven thousand four hundred and sixty-six $\frac{31}{100}$ dollars, with legal interest from Nov'r 19, A. D. 1879, and all costs. They pray for all orders and decrees necessary and for general relief in the premises.

(Sig.) ALEXANDER & BLANCHARD,
A. H. LEONARD,
Att'ys for Petitioners.

Endorsed: No. 1. U. S. circuit court, 5th circuit, western district of Louisiana. Jacobs & Smith *vs.* City of Shreveport. Petition. Filed Febr'y 11, 1882. J. W. Wheaton, clerk.

8½ The President of the United States of America to Jacobs & Smith, Benj. Jacobs, and Joseph B. Smith, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit & western dist. of La., wherein the City of Shreveport is plaintiff and you are defendants in error to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of March, 1885.

ALECK BOARMAN, *U. S. Judge.*

Endorsed: No. 1. Circuit court U. S., 5th circuit. Jacobs & Smith *vs.* The City of Shreveport. Citation. Filed April 25, '85. J. W. Wheaton, clerk.

9 *Answer.*

U. S. Circuit Court, 5th Circuit, Western Dist. Louisiana.

JACOBS & SMITH *vs.* CITY OF SHREVEPORT. } No. 1.

Now, at this day, comes the defendant, a municipal corporation, domiciliated in the said circuit, district, and State, and, for answer, denies generally all and singular the allegations in plaintiffs' petition contained.

For further answer, respondent avers that by the terms of the contract with plaintiffs the latter were to be paid by the wharfage dues collected from the steamboats landing at the wharves at the city of Shreveport, and in no other manner, and that the plaintiffs cannot, therefore, obtain a moneyed judgment for a sum against the defendant outside of said dues. The most that the defendant could be compelled to do would be to be ordered to proceed to the collection of the said dues until a sum should be collected sufficient to satisfy their claim, there being no limit in point of time set to the payment of their claim.

10 Respondent further avers that by the terms of the contract the wharfage dues were to be considered the only consideration for the work done, and that if there are no such dues there can be no other payment.

Respondent further avers that it is not its fault that the wharfage dues are unpaid; that, by the terms of the contract, the plaintiffs

were invested with full authority to collect and to compel the collection of the same; that they did in reality assume the collection and for awhile collected large amounts and applied them to the satisfaction of their claim, and that they never called on the defendant to assume the collection of these dues until the owners of the the boats had refused to pay them and resort to the courts had become necessary.

Respondent further avers that it was the true intent and meaning of the contract in giving plaintiffs the right to collect the dues to absolve the defendant from all responsibility to collect them and to throw the plaintiffs on their own power to collect as their only means of securing their pay.

Respondent further avers that, notwithstanding the fact that it was not bound to collect the dues, it did undertake to collect
11 them by application to all the owners and masters of the steamboats by persistently urging them to pay and by suits against some of them in the different courts of the State.

Respondent further avers that the reason of the failure to collect these dues in the courts and the reason of the refusal of the steamboats to pay them was that there had not been provided such wharfage and loading facilities as would justify their collection, and that this fact was so patent that the plea was recognized as a good one and proceedings suspended for the time.

Respondent further avers that it is solely the fault of the plaintiffs that these facilities do not exist; that the work contemplated by the contract was intended to so improve the street, the levee, the wharves, quays, and landing places on the bank of the river as to justify the collection of fees from the boats which used them; that by the failure of the plaintiffs to perform the stipulated work in a workmanlike manner and in accordance with the terms of the contract
12 the wharves and streets are in such a condition that the owners of the steamboats could resist successfully in the courts the payment of wharfage fees.

Respondent further avers that this work, in order to answer its purposes, must continually need repairs; that the city in parting with the revenues from the wharves and assigning them to the plaintiffs disposed of the means which would ordinarily be devoted to such repairs, and that the plaintiffs, in order to secure the collection of the fees which constituted the consideration of the contract, should have made all the repairs and have removed all complaint on this score.

Respondent further avers that, notwithstanding this fact, the city voluntarily made repairs on the wharf, the only assistance in which work furnished by the plaintiff being the donation of a lot of rock for the purpose.

Respondent further avers that this suit being nothing more nor less than a suit for damages for an alleged breach of contract,
13 the defendant has not been legally and properly put in default.

Respondent further avers that it has performed each and every stipulation entered into to be performed on its part in the contract

and portentively has it faithfully guaranteed to the plaintiffs all the wharfage dues, having scrupulously failed and refused hitherto to divert any portion of them to any other purpose whatsoever and having bestowed on the plaintiffs the power to collect the fees, thus rendering it impossible to impair their rights, which right the respondent still permits the plaintiffs to exercise in a free and unrestricted manner.

(Sig.) WM. A. SEAY,
City Attorney.
WISE & HERNDON,
Att'ys for Def't.

Endorsed: No. 1. U. S. circuit court, 5th circuit, western dist. La. Jacobs & Smith *vs.* City of Shreveport. Answer. Filed March 1, '83. J. W. Wheaton, cl'k.

14 *Exception & Plea to Jurisdiction.*

U. S. Circuit Court, 5th Circuit, West. Dist. Louisiana.

JACOBS & SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1.

Now, at this day, comes the defendant herein and excepts peremptorily to the further prosecution of this suit, for the reason that your said court has no jurisdiction of the same, in this, to wit:

That there is no law, ordinance, or constitutional provision in Louisiana which would impair the obligation of the alleged contract between the plaintiffs and defendant, and no probability of the courts of the State throwing any obstacles in the way of the execution of a judgment in their favor, if one should be obtained. On the contrary, all the State courts, from the highest to the lowest, in numerous decisions have held that the constitutional limitation of municipal taxation does not apply to contracts entered into prior to the adoption of the constitution of 1879, which this is admitted to be.

Respondent therefore prays that the suit be dismissed at the cost of the plaintiffs.

(Sig.) WM. A. SEAY,
WISE & HERNDON,
Att'ys for Def't.

15 Endorsed: No. 1. U. S. C. C., 5th circuit, western dist. of La. Jacobs & Smith *vs.* The City of Shreveport. Exception and plea to jurisdiction. Filed May 1, '82. J. W. Wheaton, cl'k.

Exception and Plea Overruled.

MONDAY, *February* 26, 1883.

JACOBS & SMITH *vs.* CITY OF SHREVEPORT. } No. 1. Exceptions and Plea to Jurisdiction Overruled.

Charge.

1st. If the jury find from the evidence that the plaintiffs contracted with defendant to do certain work at a certain price and did the work as provided by the contract, then the defendant became indebted to plaintiffs in the sum to which said work amounted at contract price.

2nd. If the jury find from the evidence that the defendants rec'd the work from the contractors and entered on the books of the city to the credit of the contractors certain amounts as the amounts due the contractors under said contracts, and if the amounts so entered are accepted by the plaintiffs as correct, then the jury must find that the amount due plaintiffs for the work done by them
16 under said contract is the amount so entered on said books of the defendants.

3rd. That the city alone had power to enforce the collection of wharfage dues, and that plaintiffs were powerless to enforce payment of such dues.

4th. If the jury find from the evidence that the contract provided means of payment of the amount due contractors under their contract, and that the city by acts of omission or commission rendered the means of payment so provided inoperative, then the entire amount due plaintiffs under the contract became immediately exigible.

5th. That the wharfage dues were by the contract pledged to secure the performance of the contract by the city, and if the pledge no longer exists, either from natural causes or through the fault of the pledgor, the obligation- of defendant under the contract nevertheless subsist.

17 6th. That the true intent & meaning of the contract between plaintiffs & defendant is that the city is bound to pay plaintiffs the entire amount due for work done under the contract; that the reference to wharfage dues on said contract merely indicated a means of payment; and if the city either failed, declined, or from any cause became unable to fulfill their obligation by the means indicated in contract, then it must be compelled to use all other available means to perform the obligations imposed on them by said contract.

7th. If the jury find from the evidence that the plaintiff demanded of the defendant that it should collect the wharfage dues from steamboats and the defendant failed to enforce payment of said dues, then the city was in default, and the entire amount due by the city to defendant became immediately thereupon exigible.

8th. If the jury find from the evidence that steamboats can-

not be compelled to pay wharfage dues because no wharfage facilities exist, then, it being the duty of the city to provide wharf-
18 age facilities, the city, by failing to provide such facilities, by its own act and fault prevented the indebtedness under contract from being paid through the means indicated in contract, and the entire amount of price of work done by plaintiffs, less amount paid thereon, became exigible.

9th. That plaintiffs were under no obligation to furnish facilities for steamboats to land at Shreveport; in other words, were not bound to construct wharves at Shreveport and keep same in order.

10th. That if the jury find from the evidence the income of city of Shreveport, which is collected under provision — art. 208, is insufficient to pay more than the am't necessary for alimony, and that the operation of art. 208 will prevent city from collecting taxes sufficient to pay its debts, then as to any debt contracted prior to the adoption of State constitution of 1879 said art. 208 violates the Constitution of the U. S. and is null and void.

11th. That the city having pledged wharfage dues bound
19 itself by implication to do everything necessary to be done in order to collect wharfages—such as making wharves and keeping them in repair.

12th. That — under its city charter is not authorized to lease the wharves.

Endorsed: No. 1. U. S. circuit court, western dist. La. Jacobs & Smith *vs.* The City of Shreveport. Charge. Filed M'ch 13, '83. J. W. Wheaton, c'k.

Verdict of Jury.

SHREVEPORT, *March 13th*, '83.

We, the jury, find the following judgment, to wit:

That the plaintiffs in this case have judgment against the defendant in the sum of $13,249.30, that being the amount of wharfage due the city of Shreveport, as proven on the trial to this date, reserving all the rights to the plaintiffs for the balance claimed by them.

E. E. SMART, *Foreman.*
J. A. LARKIN.
W. R. MERRET.
TOM GRIGSBY.
A. F. WILLIAMSON.
L. G. NICHOLS.
L. J. RUSSELL.
FRANK R. HICKS.
TOM CHRISTIAN.
B. WOLFF.
W. J. NEAL.
SAM. S. HUNTER.

20 Endorsed: No. 1. U. S. circuit court, west. dist. La. Jacobs & Smith *vs.* City of Shreveport. Verdict of jury. Filed March 13, '83. J. W. Wheaton, cl'k.

Judgment.

Circuit Court U. S., 5th Circuit Western District of Louisiana.

JACOBS & SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1.

In this case, by reason of the law & evidence and the verdict of the jury being in favor of the plaintiffs, Benj. Jacobs and Joseph R. Smith, it is ordered, adjudged, & decreed that the plaintiffs do have and recover of the defendant, The City of Shreveport, the full sum of thirteen thousand two hundred & forty-nine & $\frac{30}{100}$ dollars, with 5% per annum interest thereon from the 17th day of February, 1882, and all costs of suit, said amount being wharfage dues which should have been collected by the defendant & paid over to plaintiffs up to March 13th, 1883. It is further ordered, adjudged, & decreed
21 that said amount of $13,249.30 when paid is to be a credit on the amount due by defendant to the plaintiffs as claimed in their petition; and it is further ordered & decreed that the rights of plaintiffs for the balance due them as claimed are reserved to them.

Done & signed in open court this the 17th day of March, 1883.

ALECK BOARMAN,
U. S. Judge.

Endorsed: No. 1. U. S. circuit court, 5th circuit U. S., western dist. La. Jacobs & Smith *vs.* The City of Shreveport. Judgment. Recorded & filed M'ch 17, '83. J. W. Wheaton, cl'k.

Petition for Writ of Error.

UNITED STATES OF AMERICA:

West. Dist. La., 5th Circuit Court.

To the Hon. justice- of the Supreme Court of the United States:

And now comes the City of Shreveport, a municipal corporation under the laws of Louisiana, and domiciled in the parish of Caddo, said State, by E. H. Randolph, her attorney, and complains that in the records and proceedings, and also in the rendition of
22 judgment, in a suit between Jacobs & Smiths, plaintiffs, and The City of Shreveport, defendant, tried in the circuit court of the United States for the said western district of La., at the February term thereof, A. D. 1883, and in which judgment was rendered against her on the 17 day of March, 1883, manifest error hath intervened, to the great damage of the said City of Shreveport.

Wherefore he prays for the allowance of a writ of error & such other process as may cause the same to be corrected by the Supreme court aforesaid.

Allowed.

E. H. RANDOLPH,
City Att'y for Shreveport.

Endorsed: No. 1. U. S. circuit court. Jacobs & Smith *vs.* The City of Shreveport. Petition for writ of error. Filed March 12th, 1885. J. B. Beattie, d'y c'k.

Citation.

U. S. of America to Jacobs & Smith, Benj. Jacobs & Jos. B. Smith, Greeting:

23 You are hereby cited and admonished to be and appear at — Supreme Court of the United States to be holden at Washington on the — Monday in —— next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit and western dist. of La., wherein The City of Shreveport is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12 day of March, 1885.

(Sig.) ALECK BOARMAN,
U. S. Judge.

Endorsed: No. 1. U. S. circuit court, western dist. La. Jacobs & Smith *vs.* The City of Shreveport. Citation.

Waiver of Service of Writ of Error.

Circuit Court for 5th Circuit of U. S., Western Dist. of La.

JACOBS & SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1 on Docket.

SHREVEPORT, *M'ch* 12, 1885.

24 In the above case, in which copy of writ of error has been filed in the cl'k's office, returnable to the Supreme Court of the United States at Washington, D. C., on 2nd Monday of Oct., 1885, copy of citation is waived and service of same accepted.

ALEXANDER & BLANCHARD,
Att'ys for Plaintiffs & Def'ts in Writ of Error.

Before me, Jno. W. Wheaton, clerk U. S. court, 5th circuit, came E. H. Randolph, att'y for def'ts above, who, being sworn, deposes & says he saw T. Alexander, of the firm of Alexander & Blanchard, sign the above waiver as set forth.

E. H. RANDOLPH.

J. W. WHEATON, *Cl'k.*

Endorsed: No. 1. U. S. circuit court, western dist. La. Jacobs & Smith *vs.* City of Shreveport. Waiver of service of writ of error. Filed March 12th, 1885. J. B. Beattie, d'y cl'k.

Bond for Writ of Error.

Circuit Court of the United States for the Western District of Louisiana.

JACOBS & SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1.

25 Know all men by these presents that we, The City of Shreveport, thro' A. Currie, mayor, as principal, and R. R. Deming and S. B. McCutchen, of Shreveport, Louisiana, are held and firmly bound unto Jacobs & Smith, plaintiffs in above case, of the parish of Caddo, State of La., in the sum of two hundred & fifty dollars, to be paid to Jacobs & Smith, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, & our and each of our heirs, executors, & administrators, firmly by these presents.

Sealed with our seals. Dated this 12 day of March, 1885.

Whereas the above-named City of Shreveport hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the U. S., 5th circuit:

Now, therefore, the condition of this obligation is such that if the above-named The City of Shreveport shall prosecute her
26 said writ of error to effect & answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. CURRIE,
Mayor of Shreveport, La.
R. R. DEMING.
S. B. McCUTCHEN.

Sealed & delivered in presence of—
Attest:

J. B. SLATTERY,
U. S. Commissioner.

UNITED STATES OF AMERICA, *Western Dist. of La.:*

R. R. Deming and S. B. McCutchen, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

R. R. DEMING,
S. B. McCUTCHEN.

Sworn to before me this 12th day of March, 1885.

J. B. SLATTERY,
U. S. Commissioner.

I approve the above bond & the sufficiencies of the sureties thereto and order that — have such effect in law as it is entitled to.

ALECK BOARMAN,
U. S. Judge.

27 Endorsed: No. 1. U. S. circuit court, western dist of Louisiana. Jacobs & Smith *vs.* The City of Shreveport. Bond for writ of error. Filed March 12, '85. J. B. Beattie, d'y cl'k.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the western district of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Jacobs and Smith *vs.* The City of Shreveport, No. 1 on docket, a manifest error hath happened, to the great damage of the said The City of Shreveport, as by her complaint appears, we, being willing that error, if any hath been, should be duly
28 corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 12th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

J. B. BEATTIE,
29 *D'y Cl'k of the United States Circuit Court for the Western District of Louisiana.*

Endorsed: United States circuit court. No. 1. Writ of error. Jacobs & Smith *vs* The City of Shreveport.

Copy of a writ of error lodged in the clerk's office of the circuit court of the United States for the fifth circuit and western district of Louisiana in pursuance of the statute in such cases made and provided this 12th day of March, one thousand eight hundred and eighty-five.

E. H. RANDOLPH,
Attorney for Plaintiff in Error.

Filed March 12th, 1885.

J. B. BEATTIE, *D'y C'k.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
Western District of Louisiana:

I, John W. Wheaton, clerk of the United States circuit court, fifth judicial circuit, western district of Louisiana, do hereby certify that the foregoing 29 pages contain a true, full, and correct transcript of all the documents filed and proceedings in the
30 foregoing suit, entitled Jacobs & Smith *vs.* The City of Shreveport, being No. 1 on the docket of said court, except documentary evidence; also that the original writ of error, waiver of service of writ of error, and citation are herewith attached.

Given under my hand and official seal, at Shreveport, on this the third day of July, A. D. 1885.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clk.*

31 Memorandum of an agreement entered into this day, May 3, A. D. 1871, between The City of Shreveport, represented herein by Major J. B. Gilmore, on the first part, and Benjamin Jacobs and Joseph Smith, *in solido*, of the second part.

Jacobs and Smith agree to macadamize Commerce from the westerly side of Texas street to eastern side of Cotton street, according to the plans and specifications on file in controller's office and known as Devve specifications and identified with this agreement, for the sum and price of 5.40, five dollars and forty cents, for each square yard of macadamizing and 65c., sixty-five cents, per cubic yard for grading and putting the road-bed in the proper condition for rocking or macadamizing the same, the water channels and gutters provided for to be paid at the same rates as above per yard; the payments for said work to be made by the said city and by the owners of the property fronting on said street in their respective proportions, according to the statute of A. D. 1869, No. —, which provides for improvements of the streets of the city of Shreveport—that is, the said owners shall pay for their respective share or proportion of said work according to said statute, and the said city agrees and promises to
32 pay the sum due by said city in accordance with said statute in and with the funds and proceeds arising from the collection of the wharfage dues at the wharf or wharfes in said city. The city agrees that the contractors shall be entitled to and receive the said dues as they are paid by or collected from the steamboats at said wharf, and by this agreement the contractors are authorized and empowered to collect the said wharfage dues at not less than the present rates until the sum to be paid by the city is fully paid and discharged. Further, it is agreed and understood that the true intent and meaning of the above promises on the part of the city is that said city in good faith guarantees and warrants the payment of the whole and entire sum due to said contractors for all the work

done in accordance with this agreement, and that the contractors shall have a vested right in and to all of the proceeds and funds of said wharfage, & they shall in person or through their legal representatives continue to collect and receive the same at not less than the present rates until all of the work done by said contractors is paid for, and until all of the obligations of the city and owners of property in this matter or contract are fully discharged according to the true intent and meaning of this agreement.

The city agrees that the contractors shall have the privilege
33 of getting or taking rock from the streets or public grounds of the city, provided that they shall in a satisfactory manner repair any damage they may do to the said places or streets.

The contractors agree to begin the work as soon as practicable and have the entire length and width of the said street between said points furnished and completed on or before the first day of January, A. D. 1871: Provided, That if this city should be visited by an epidemic or any unforeseen cause should interfere with the progress of the work the time for completing the same shall be reasonably extended by the city.

The wharfage dues to be collected by the contractors on the wharfage accounts against the steamboats, turned over to said contractors by the controller from time to time as said accounts become due and collectable.

The work to be paid for by the city and owners on the monthly estimates made by the city surveyor, and the work to be received and approved by said surveyor.

Done and signed in the city of Shreveport, May 4th, A. D. 1871, in the presence of Aleck Boarman and Wm. Wright.

J. B. GILMORE, *Mayor.*
B. JACOBS.
JOS. B. SMITH.

Attest:

ALECK BOARMAN.
W. N. WRIGHT.

34 CLERK'S OFFICE, CADDO PARISH, LA.

I hereby certify that the within and foregoing is a true and correct copy of the original contract or agreement on file and of record in my office.

Given under my hand and seal of office, at Shreveport, La., on this the 1st day of March, A. D. eighteen hundred and eighty-three.

[Seal First District Court, Parish of Caddo, La.]

W. G. BONEY,
Dep. Clerk & ex Officio D'y Recorder.

[Endorsed:] Jacobs & Smith with City of Shreveport. Agreement. Filed & recorded June 8th, 1871. John N. Hicks, deputy recorder. Copy.

Endorsed: Filed in evidence M'ch 10, 1883. J. B. Beattie, d'y cl'k.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office, suit No. 1, on docket C. C., 5th cir., west. dist. La., Jacobs & Smith *vs.* City of Shreveport.

Witness my hand & seal of said court, at the city of Shreveport, this 3rd Octo., 1885.

[Seal U. S. Circuit Court for the Western Dist. of La.]

J. W. WHEATON, *Clerk.*

35 U. S. Circuit Court, 5th Circuit, West. Dist. La.

JACOBS & SMITH
vs.
THE CITY OF SHREVEPORT. } No. 1 on Docket.

On writ of error to Supreme Court of U. S. The City of Shreveport, plaintiff in error.

SHREVEPORT, *Octo.* 3, 1885.

In order to save the costs of a certiorari in above case, the copy of the contract attached to plaintiffs' petition not having been copied in the transcript, we hereby consent that a copy, duly attested by the clerk of U. S. court, Jno. W. Wheaton, of the said contract filed in said suit may be filed with the transcript in this case the same as if it originally had been there copied.

ALEXANDER & BLANCHARD,
Att'ys for Plaintiff.

Endorsed on cover: W. Louisiana C. C. U. S. No. 377. The City of Shreveport, plaintiff in error, *vs.* Benjamin Jacobs and Joseph B. Smith, as Jacobs & Smith. Filed October 12, 1885.

Supreme Court of the United States.

OCTOBER TERM, 1887.

CITY OF SHREVEPORT, *Plaintiff in Error*,

vs.

JACOBS & SMITH.

No. ~~377~~ 106.

ANDREW CURRIE, MAYOR, AND OTHERS,

Plaintiffs in Error,

vs.

U. S. *ex rel.* JACOBS & SMITH.

No. ~~376~~ 107.

BRIEFS FOR PLAINTIFFS IN ERROR.

CHARLES W. HORNOR,
Attorney.

WM. H. MOORE, PRINT., 511 ELEVENTH ST. N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

CITY OF SHREVEPORT, Plaintiff in Error,

vs.

BENJ. JACOBS *et al.*

No. ~~377.~~ 106.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

Brief for the Plaintiffs in Error.

On *May* 3, 1871, the city of Shreveport contracted with Jacobs & Smith *in solido* to macadamise Commerce from the westerly side of Texas street to eastern side of Cotton street for $5.40 for each square yard and 65c. per cubic yard for grading, payable by the city, and the owners of property fronting on said street in their respective proportion, under authority of act No. 109 of the General Assembly, A. D. 1869, the said city promising to pay their share with the funds arising from wharfage dues to said city as they are paid by the steamboats, and by this agreement the contractors are empowered to collect the said wharfage dues until the sum to be paid by the city is fully paid. The city warrants the payment of the entire sum due to said contractors for all the work done according to this agreement. The contract is set forth at length on Rec. p. 13, 14.

February 11, 1882, Jacobs & Smith, *residents* of Shreveport, sue upon this contract to recover $47,466.31 with 5 per cent. interest from November 19, 1871. They aver that they did all the work, amounting to $98,192.49, and that Shreveport is indebted to them for it; that they have received from owners of property $13,476.32 plus 3,235.25 plus wharfage dues paid by Shreveport, $34,014.61,

leaving the balance as heretofore. That Shreveport has collected no wharfage since Dec. 20, 1878; that it has been *put in default and will not collect*, and thereby the above balance claimed has become due and exigible.

That Louisiana's laws entered into their contract, and therefore, in the event of failure on part of either of the contracting parties to comply with the obligations resulting from said contract, petitioners had adequate remedies for the enforcement of their rights.

But that article 208 of Louisiana's constitution of 1879 has impaired the obligation of said contract by depriving petitioners of all remedies for the enforcement of same, in this, *viz:* by limiting municipal taxation throughout said State for all purposes whatever to ten mills on the dollar of valuation.

That the city property taxed at this rate will yield but $18,538.20 and licenses not over $7,500, and that it has no property which can be seized under execution, and no revenues except such as are derived from taxation; that the entire revenues for any one year do not exceed the sum of $31,000, an amount not more than sufficient for its alimony and which must be appropriated for that purpose, and in consequence of said constitutional limitation, if same be valid and operative, no means exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its just debts.

Petitioners allege that article 208, so far as same limits municipal taxation, is as to them null and void, because it violates the tenth section of the first article of the Constitution of the United States prohibiting the State of Louisiana (with all other States) from passing any law impairing the obligation of contracts. They pray for judgment declaring article 208 of the Louisiana constitution null and void, and for $47,466.31 with legal interest from November 19, 1879, and all costs. (Record, pages 1, 2, 3.)

May 1, 1882, exception and plea to the jurisdiction was filed for Shreveport: "That there is no law, ordinance or constitutional provision in Louisiana which would impair the obligation of the alleged contract between the plaintiffs and defendant, and no probability of the courts of the State throwing any obstacles in the way of the execution of a judgment in their favor, if one should be obtained. On the contrary, all the State courts from the highest to the lowest in numerous decisions have held that the constitutional limitation of municapal taxation does not apply to contracts entered into prior to the adoption of the constitution of 1879, which this is admitted to be." (Record, page 6.)

March 1, 1883. Answer was filed, pleading first, the general issue; second, that the payment for the work was to be made by wharfage dues to Shreveport, and in no other manner, these being considered by the contract the only consideration for the work done; that plaintiffs are in fault in not making necessary repairs

to wharves and street; that defendants have not been put *in mora;* and, lastly, full performance on their parts without any impairment of plaintiffs' rights. (Record, pp. 4, 5 and 6.)

February 26, 1883, (Record p. 7,) exception was overruled. A trial on the merits seems to have been had in which the charge to the jury reads, amongst other things, as follows: "*Tenth*, that if the jury find from the evidence the income of the city of Shreveport, which is collected under provision Art. 208, is insufficient to pay more than the amount necessary for alimony, and that the operation of art. 208 will prevent city from collecting taxes sufficient to pay its debts, then as to any debt contracted prior to the adoption of State constitution of 1879, said art. 208 violates the Constitution of the United States and is null and void." (Record, pages 7 and 8.)

March 13, 1883, a *verdict* was given for plaintiffs "against defendant for $13,249.30, that being the amount of wharfage due the city of Shreveport, as proven on the trial, *to this date*, reserving all the right to the plaintiffs for the balance claimed by them." (Record, p. 8.)

March 17, 1883, *judgment* for this amount, with interest from February 17, 1882, and all costs of suit, "said amount being wharfage dues which should have been collected by the defendant and paid over to plaintiffs up to March 13th, 1883. It is further ordered, adjudged, and decreed, that said amount of $13,249.30, when paid, is to be a credit on the amount due by defendant to the plaintiffs, as claimed in their petition; and it is further ordered, adjudged, and decreed that the rights of plaintiffs for the balance due them as claimed are reserved to them." (Record, p. 9.)

Shreveport sued out this writ of error.

Assignment of Errors.

First. The lower court was without jurisdiction both *ratione materiae* and *ratione personarum.*

Second. The lower court erred in not sustaining Shreveport's exception and plea to jurisdiction.

Third. No interest should have been inserted or allowed in the judgment contrary to the verdict.

Fourth. Under the *allegata* and *probata* no judgment could be legally rendered for any sum of money in favor of plaintiffs and against the defendants.

Fifth. The petitioners have mistaken their remedy.

Argument.

It must be admitted that under the constitutional clause of the judicial power of the United States, section 2, relative to Controversies "between citizens of different States," there is no jurisdic-

tion here. Jacobs & Smith are citizens of Louisiana impliedly, for they aver they are "*residents* of Shreveport" in their petition; and impliedly, or by a presumption of law, Shreveport, a city and hence a municipal corporation, is a citizen of the State, which gives it its charter of incorporation. (Railroad *vs.* Wheeler, 1st Black., 286.) The controversy here is between citizens of the same State. It must also be admitted that the effort here is to give original concurrent jurisdiction to the Federal circuit courts. If the claim to all original concurrent jurisdiction over controversies between citizens of the same State had been inserted in the Constitution, it is hardly credible that the Constitution would have been adopted. Even in the exercise of the ordinary appellate jurisdiction of this court it is still held that, in controversies between citizens of different States, the term "residents" is not equivalent to "citizenship," and that if the former is employed in the pleadings instead of the latter your honors can only reverse both on error and appeal and remand for further proceedings.

But the Federal circuit court is asked here to assume original concurrent jurisdiction between citizens of the same State by virtue of an act of Congress of March 3, 1875, "to determine the jurisdiction of circuit courts of the United States," &c.; the first section provides "that the circuit courts of the United States shall have original cognisance *concurrent with the courts of the several States* of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and *arising under the Constitution or laws of the United States*," &c., all which has been aptly concentrated into this proposition: "All suits arising under the Constitution or laws of the United States may be brought originally in the circuit court of the United States without regard to the citizenship of the parties, by the act of March 3, 1875."

Howes *vs.* Water Company, 104 U. S., 450.

We may, therefore, assume that without this statute the plaintiffs would have had no right whatever to invoke the original jurisdiction of the Federal court.

Unless, then, the allegations of the plaintiffs' petition make out a controversy, or a suit *arising under the Constitution or laws of the United States*, the lower court was without original concurrent jurisdiction with the courts of the several States.

I.

No party can bring an action at law or in equity before his right to do so accrues—a proposition too clear for argument. The instant action is on a contract and in the sphere of contract law, and until the plaintiffs have a right of action to *enforce* this con-

tract, they have no right to any relief from the Federal courts. *Their citizenship precludes this.* The sphere of contract is evidently much larger than the sphere of Federal Constitution or laws. It would be destructive to every principle of law to hold that over all contracts the circuit courts of the United States have jurisdiction without regard to the citizenship of the parties, but over all contracts arising under the Constitution or laws of the United States it is contended the act of Congress of March 3, 1875, confers upon them original concurrent jurisdiction with the courts of the several States.

No doubt exists of the legislative intent of this law. *First*, it was intended to curtail the general jurisdiction of the State courts. *Second*, and to enlarge the special concurrent original jurisdiction of the Federal circuit courts. *Third*, it was not intended to curtail the jurisdiction of the Federal district court in any way. *Fourth*, it was to complete or complement the original concurrent jurisdiction of the Federal courts by extending it to its farthest constitutional limits.

The predominant trait of the act however, is that while in its title it sets out "to regulate the removal of causes from State courts," it provides in the fifth section that if it shall appear "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court," the suit is to be dismissed. Ordinarily, where there are two or more courts of concurrent original jurisdiction the question, Which of them shall have jurisdiction? pertains to the arbitrary subjective choice of the creditor. He can select the one that pleases him. His *motives* have nothing whatever to do with the jurisdiction. He has precisely the same right of choice as to court as he has to the moment of time at which he pleases to bring his action. But here from the very nature of the constitutionally limited jurisdiction of the Federal circuit courts, before they have jurisdiction, it must be plain that they have a case before them really and substantially involving a Federal question, *i. e.*, "arising under the Constitution or laws of the United States."

Plaintiffs must show really and substantially such a case in their petition. If their plain intent be to evade "the discrimination between suits between citizens of the same State and suits between citizens of different States," they must fail here.

Bernard Township *vs.* Stebbins, 109 U. S., 353, and cases cited.
McDonald *vs.* Smalley, 1 Peters, 619.
Gold-Washing Co. *vs.* Keyes, 96 U. S., 199.
Little *vs.* Giles, 118 U. S., 604.

II.

This evasion is apparent from the very averments of the petition. It sets forth no case "arising under this Constitution."

The petitioners neither allege nor show any vested or acquired right of action in the Federal court. This right which they claim never arose; it never began; it has not even yet begun. It is purely absolutely *ambulatory.* "It has not assumed such a form that the judicial power is capable of acting upon it." It is neither real nor substantial, but purley contingent, simulated, potential, arbitrary, conditional. One of the averments is that art. 208 of Louisiana constitution "*has impaired the obligation of* (*their*) *said contract*" by depriving petitioners of all their remedies for its enforcement. This article provides that "no parish or municipal tax for all purposes whatosever, shall exceed ten mills on the dollar of valuation." It is further averred that IF "said constitutional limitation be valid and operative, no means "exist under the law of Louisiana by which said city can raise funds wherewith to pay or be compelled to pay its debts."

But plaintiffs are without right to make any such allegation and proof. "A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts." (Louisiana Code, article 8.) How unjust and disorderly the assumption is that the Louisiana constitution acted, or intended to act, in violation of existing contracts, is manifest from the very language of the exception: "All the State courts, from the highest to the lowest, in numerous decisions have held that the constitutional (State) limitation of municipal taxation does not apply to contracts entered into prior to the adoption of the constitution of 1879, which this is admitted to be."

Folsom case, 32 La. An., 709, and 109 U. S., 285.
Gas. Co.'s case, 32 La. An., 268, and 108 U. S., 268.

If, indeed, the convention framing the Louisiana constitution of 1879 "intended to do what is claimed, it was bound to do it openly, intelligently, and in language not to be misunderstood, and as a doubtful or obscure declaration would not be *justifiable*, so it is not to be *imputed.*"

Hayes *vs.* Holly Spring, 114 U. S., 120, quoting 17 Wall., 436.
Civil Rights cases, *arguendo*, 109 U. S., pp. 12–45.

The plaintiffs' motives, therefore, in this question of evasion of jurisdiction, are the very *causa sui* of the case. It may be admitted that motives have nothing to do with Federal jurisdiction "between citizens of different States," as suggested or perhaps determined in some of the cases cited; but motives are substantial and actual under this act of 1875.

Insurance Co. *vs.* Broughton, 109 U. S., 125.
Quincey *vs.* Steel, 120 U. S., 247.
Farmington *vs.* Pillsbury, 114 U. S., 138.

III.

The old meaning above given attached to the words "arising under this constitution," has not been weakened, but strengthened by recent judicial decisions. "If from the questions (involved) it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875, otherwise not."

Starin *vs.* New York, 115 U. S., 257.
Hartell *vs.* Tilghman, 99 U. S., 47.

This expression, "arising under the Constitution," is ambiguous merely from the fact that the Constitution was proposed to the States for their adoption; and whilst this proposal was unaccepted, the word "arising" was eminently proper. But on the adoption of the Constitution it necessarily became "may arise." The idea that the jurisdiction attached whilst the case or controversy was "arising," and before it had really and substantially "*arisen*," is contrary to all correct notions of law; and yet seems to lie at the very foundation of plaintiffs' petition. "In this case *such a question has not arisen.*"

Railroad *vs.* Wiggins Ferry Co., 108 U. S., 18.

"It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

See Chew Heong *vs.* United States, 112 U. S., 536–540, 559.

It is not claimed that there is any law of the United States except the act of 1875 justifying this suit, from the judiciary act down to the act of 1887. And it is far beyond the possibility of human reason to give two constructions to the provision of the Federal Constitution as to the contract clause. No State shall pass any "law impairing the obligation of contracts."

Article 208 of the Louisiana constitution provides a definite limit to municipal taxation; and taxation is a sphere of legislation in which the State is claimed to be sovereign. Your honors are all familiar with the innumerable suits reported, involving municipal bonds for railroads and other purposes. It was high time to put a stop to a system that the judiciary had faithfully denounced from the very adoption of the Constitution. Many millions of property of the citizens of this little State of Louisiana have been squandered on the Great Northern, the Opelousas, the Chattanooga, and other railroads by the municipalities of Louisiana. The concluding paragraphs on this subject in Moore

vs. New Orleans, 32 Louisiana Annual, p. 750, are quite eloquent on this point. They are the groans of a suffering State. As a restraint upon the legislative power of the State in the future the article 208 was added to its constitution. It seems as though some active violation by the officers of the State of the contracts of individuals and their rights under these contracts would alone justify a resort to the act of 1875, even if Congress has the power to legislate so as to give to the federal circuit courts the requisite concurrent jurisdiction for this purpose. The assumption that a State law passed to regulate taxation actually and substantially violates the obligation of a contract, in view of all the rest of the State's legislation and the State's jurisprudence, without a single judicial fact to base it upon but the bare statement of naked statistics showing the insufficiency of a tax of ten mills on the dollar of valuation to pay the plaintiffs' claim, seems not only unreasonable but inconsistent with the correct idea of a Federal Government.

But assuming the act of 1875 to be unobjectionable constitutionally, and that the judicial language, carefully guarded in the opinion of this court in the civil rights cases, exhibits the existing state of the law on October 15, 1883, "*probably* Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by State law; and under the broad provisions of the act of March 3, 1875, ch. 137, 18 Stat., 470, giving to the circuit court jurisdiction of all cases arising under the Constitution and laws of the United States, it is *possible* that such jurisdiction now exists. But under that, or any other law, it must appear as well by *allegation*, as by *proof* at the trial, that the Constitution *had been* violated by the action of the State legislature. Some obnoxious State law passed, or that might be passed, is necessary to be *assumed* in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason that the constitutional prohibition is against *State laws* impairing the obligation of contracts."

No support can be had to the jurisdiction in this authority either from the opinion of the court or from the dissent To invoke federal jurisdiction in view of the decisions of the Louisiana courts upon the very article of the State constitution which is the basis of the action, would perhaps violate the true spirit and meaning of every decision of this honorable court on the act of 1875. Indeed, the reported cases where the question Has the federal circuit court the right to enjoin a State from violating the contract clause of the Constitution? has arisen and been decided are—

Water-Works *vs.* Rivers, 115 U. S., 674.
The Water-Works Cases, 120 U. S., 66.
New Orleans *vs.* Houston, 119 U. S., 265.

But these cases differ altogether from this, and cannot aid in any affirmance of the jurisdiction as having been exercised by the Federal circuit court. The allegations are fully set forth, and so made as apparently to justify the assumption of original jurisdiction in a controversy between citizens of the same State. Besides, there is no plea to the jurisdiction apparent in the statement of the cases, and the question, *if it ever arose*, seems to have passed *sub silentio*.

There was a pressing urgency for the writ, and the highest court in Louisiana had pronounced already on the governing principles of law.

IV.

The contention here is that, really and substantially, there is no question involved which has arisen "under the Constitution or laws of the United States." In other words, in all questions involving the incompatibility of State statutes with the Federal Constitution or laws, there must be a decision upon the State law by the highest court in that very State *before* the appellate jurisdiction of your Honors can be properly invoked, and the decision of the State court must be in favor of their validity. If another remedy has really been given to the *domestic* creditor it has not been expressly done by the act of 1875. If "it is the right and the duty of the national Government to have its Constitution and laws interpreted and applied by its own judicial tribunals"—a proposition freely admitted—there would be a strong presumption of an existing correlative right in the State governments to have their constitutions and laws interpreted and applied in a like way by their own judicial tribunals. "In cases arising under them—*i. e.*, the Federal Constitution and laws—properly brought before it, this Court (the Supreme Court of the United States) is the final arbiter." This must also be admitted in its fullest extent. But the act of 1875 makes the Federal circuit court not only the arbiter incipient, consecutive, and final, but under the devolution of original concurrent jurisdiction with the courts of the several States the act has in the instant case been so interpreted and applied as to make its jurisdiction original and *exclusive of the State courts* under a naked and simple allegation of jurisdiction.

Before the formation and adoption of the Federal Constitution the several States, as recognised by the mother country, had jurisdiction within their boundaries of everything that occurred; their government consisted of their constitutions, statutes, and common law. The moment the Federal Constitution was adopted by them it became their supreme law of the land. Acts of Congress were needed to carry out and make executory this supreme law, and when made *pursuant to the Constitution* these acts, to-

gether with the treaties, became parts of this supreme law. Therefore, before the Judiciary Act of 1789 was passed, the several States that had adopted the Federal Constitution had original jurisdiction over all matters arising under the Constitution, laws, and treaties of the United States, because these were just as much the laws of each State as its own constitution, statutes, and common law. Prior to the date of the Constitution we had no Federal tribunals. The distribution of justice was then confined to the State courts. (See, on this, Chisholm *vs.* Georgia, 2 Dallas, 474.) Hence when Congress passed the Judiciary Act of 1789 they did not take away from the State courts this original jurisdiction, but vested it *concurrently* in the circuit and district courts of the United States.

The very essence of the notion of concurrent jurisdiction is its equality. To any suitor two courts of concurrent jurisdiction may present themselves, in either of which, indifferently, and at his own selfish, arbitrary choice he may bring his action. But he must adhere to his choice when definitely made. To permit him to change it is to convert the concurrent jurisdiction of both courts into the exclusive jurisdiction of one. This doctrine would lead to irremediable confusion in the whole subject of jurisdiction.

The Judiciary Act of 1789 sanctioned in full this notion as to *State laws*, in particular; and it seems to be a novel doctrine, nowhere explicitly declared in the Constitution, that inferior Federal courts could have conferred upon them original, concurrent, and "direct" jurisdiction with the courts of the several States to pronounce upon the constitutionality of State laws. The power to do this has not been granted, and like all other constitutional denials of "powers to the States"—that is, prohibitions on State action—the final arbiter is this honorable Court, and this only in its exercising of a general, supervisory, appellate jurisdiction over this sphere of Federal law as the highest court of appeal in the nation. Any other construction of the act of 1875 would be a repeal of the letter and spirit of the Judiciary Act of 1789 and of article 709 of the Revised Statutes of the United States, and a direct attack on your Honors' appellate jurisdiction as therein established. The effort to give this wide construction to the act of 1875 has been unsuccessful in at least one decided case.

Venable *vs.* Richards, 105 U. S., 636.

Another view from the same point of your honor's appellate jurisdiction. Bearing ever in mind that "within their respective spheres of action the Federal Government and the government of a State (Louisiana with all other States) are both of them independent and supreme; but each is utterly powerless beyond the limits assigned to it by the Constitution," and that, conse-

quently, nullifying State constitutions is the very highest attribute of national judicial power excepting, perhaps, nullifying acts of Congress, and that both these attributes can be freely and fully exercised only under your appellate jurisdiction, as we contend, under R. S. U. S., 709, it would seem far more orderly and regular and appropriate, more consonant with the continued existence of our republican Government and the republican virtue of our people in all questions of the congruity of State constitutions and State statutes to the Federal Constitution, to give to the highest courts of the States *the first opportunity of passing upon them*, and preparing them for the action of the final arbiter. We have full knowledge that this mode of arrangement existed in the minds of those who framed the Constitution, and we doubt if Congress intended to change it by the act of 1875, admitting *a. g.* that they had the constitutional right to do so.

Plaintiffs' motives in instituting their suit in the inferior court were plainly to obtain a mandamus from that quarter on the aldermen of the city of Shreveport compelling them to levy a special tax to pay any judgment they might chance to obtain. The moment these motives become apparent the act of 1875 peremptorily requires the judge to dismiss the suit. To hold otherwise would be to make the original concurrent jurisdiction of the federal courts exclusive of the jurisdiction of the State courts. It would be to deprive the judiciaries of the several States of the first blow at the violations of the Federal Constitution by the Legislatures of the several States. It would weaken greatly the comity due from this tribunal to the States' highest judiciaries. It would upturn one of the longest and best settled principles of federal jurisprudence; for here there can be no doubt of what the supreme court of Louisiana, under the constitution of 1879, has always held to be the true meaning of article 208 therein contained. It would be hard to express this in more forcible language than that employed in Moore *vs.* C. N. O. by the first and still continuing supreme court of Louisiana under its constitution of 1879, 30 Annual, p. 747: "We have heretofore, in the recent case of Folsom *vs.* City (*ut supra*), had occasion to consider the effect of this article (209) of the Constitution; and we now repeat that the article must have a rigid enforcement with regard to all creditors whose rights are protected by the Constitution of the United States, and with regard to all future operations of the city government of every kind whatever. But it is perfectly clear that the rights of antecedent contract-creditors are protected by the Constitution of the United States, and they are entitled to have them enforced" in all respects as if "this provision of the constitution (of Louisiana) had not been passed;" quoting 4 Wall., 535, Von Hoffman *vs.* Quincy. "The fact that the act of the State is a constitutional provision instead of a mere legislative act does not affect the

case;" quoting R. R. Co. *vs.* McClure, 10 Wall., 515. "It is apparent, therefore, that whatever per centage of taxation may be required to meet the maturing obligations in interest or principal of antecedent contract-creditors, must, in any and all events, be levied."

It is quite impossible to derive from any other source a better, clearer, sounder exposition of article 209 of the Louisiana constitution of 1879.

Now, it is equally clear that had the contract-creditors of Shreveport been citizens of a large State like Pennsylvania or Texas, they might beyond a peradventure have chosen to sue on their contract in the federal circuit court of Louisiana *ratione personarum;* but had they annexed to their petition the allegations as to the unconstitutionality of the article 209 of the Louisiana constitution in order to obtain a mandamus, the plain judicial duty would have been to deny all relief on this part of their prayer for relief. In view of the decisions of the highest court of the State on the articles of its constitution, to entertain such a prayer would be a reversal of the laws governing this court. "Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate *and the construction of State constitutions and statutes.* Such established rules are always regarded by the federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is."

Burgess *vs.* Seligman, 107, U. S. 33: Nothing otherwise has been provided by the Constitution, treaties or statutes of the United States (R. S. U. S. 721, 914.)

The decision in Moore's case was rendered in May, 1880, and in the instant case in February, 1883.

This view is conclusive. The alleged ingredient or element or constitutive portion of the suit here under consideration on which Federal jurisdiction is based has nothing whatever to do with the contract sued upon. It is equivalent to a false allegation of citizenship to give jurisdiction. The question of remedy by execution can only "arise" after final judgment, and this is here the pivot on which the case turns. The ingredients of the suit are inconsistent and destructive. The demand is brought under State law and against State law at the same time. It is even stronger. The plaintiffs ask for relief under the laws of the State and at the same time seek to annul one of its constitutional provisions. (See La Code of Practice, Articles 147 to 161 inclusive.) The verdict and judgment are both silent as to

article 208 of the Louisiana constitution. This fact demonstrates the entire irrelevancy of the constitutive ingredient of this part of the case.

V.

The verdict was entirely silent on the subject of interest. "Where verdict of jury allows no interest, the court can allow none."

Cochrane *vs.* Murphy, 4, La An, 6, and cases cited; 5 Martin, N. S., 448; Ibid, 461; 7 Martin, N. S. 225; Ibid, 263. All these cases are actions *ex contractu*.

Unless verdict displays the interest the court cannot go out of the record to discover it.

Barker *vs.* McCrary, 66 Penn., 162.
See also Adams *vs.* Palmer, 30 Penn., 347.

The jury were liquidating an unsettled open account, and no interest was due till the account was liquidated.

Redfield *vs.* Iron Company, 110 U. S., 174.

VI.

The argument on the fourth assignment of error, that on the face of the record, no judgment could be rendered for any sum of money against the defendants more logically belongs to the discussion of the mandamus case No. 378, to which the court is respectfully referred.

CHARLES W. HORNOR,
Attorney for the City of Shreveport.

WASHINGTON, D. C., *March* 7, 1888.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

ANDREW CURRIE, MAYOR, AND OTHERS,
Plaintiffs in Error,
vs.
U. S., *ex. rel.* JACOBS & SMITH.

No. ~~378~~ 107.

Brief for Plaintiffs in Error.

This case is the necessary completion of that of city of Shreveport, Plaintiffs in Error, *vs.* Jacobs & Smith, No. 377. It is the effort, successful below, to coerce the payment of the final judgment rendered against the city of Shreveport by means of a mandamus directed to the mayor and trustees commanding them to levy a tax to pay it. For the mandamus it was alleged: The original judgment was rendered on *March* 17, 1883. Execution was issued on it and returned unsatified; that the mayor and trustees of said city refuse to pay the judgment or to place it upon the budget or levy a tax for its payment. The prayer is for a peremptory mandamus to compel them to place said judgment upon the budget of 1885 and to levy a tax for said year to pay it with interest and costs, &c. (Filed January 13, 1885, Record, p. 3, 4.)

February 23, 1885, exception and motion to quash was filed, and overruled next day. (Record, p. 4, 5.

February 25, 1885, motion was made recusing the Hon. A. Boarman, "who did not sit in the trial of the suit No. 1, (No. 377), Jacobs & Smith *vs.* City of Shreveport, which was tried by Hon. A. Pardee, circuit judge of this court, for the reason that he, the said Judge A. Boarman, having been of counsel for one or the other party, was recused; and therefore, as the present proceeding is merely auxillary to the original suit No. 1, the same reason and failing should apply now." (Record, p. 5.)

The motion to recuse was overruled *eo die* and answer filed, reserving benefit of excepting to the ruling of the court in overruling said exception or motion, and further reserving the motion to recuse, defendants allege that the judgment is a nullity for want of jurisdiction, for the reason it was a suit between citizens of the same State and no question was involved in which there was a violation of the Constitution or laws of the United States.

That the obligation evidenced by said judgment cannot be enforced by levy of taxation, as in the ordinance enacting and incurring said indebtedness, no provision was made to pay the principal and interest of same, and the said ordinance was therefore violative of a prohibitory law of the State as embraced in Revised Statutes, sections 2448 and 2786.

And, further, that a special fund was set apart in said ordinance, to wit, the revenues arising from wharfage collection, which was intended to be exclusive of any other method.

Further, that, under its organic law, the city-council meets once a year and adopts a budget upon which to levy taxes; that it has already performed that duty at the usual time; that no taxation can be levied to pay anything until the claim has been placed on budget, and that having performed its duty as pointed out by law it cannot now be forced to make any additional budget or levy of taxation.

That under the State constitution defendant is limited in its power of taxation to ten mills on the dollar, which limit has been reached; and therefore, for the reasons set forth, defendant cannot be forced to levy a tax as prayed for. (Record, p. 6.)

The record exhibits explicitly no demurrer, plea, or joinder in issue.

March 7, 1885, judgment and decree that a peremptory mandamus issue to the respondents, mayor, and trustees to amend their budget and include therein the judgment of relators, and they are ordered and commanded, "at their next meeting for levying taxes for the current year 1885, to levy a special tax of not more than three-quarters of one per cent. on each one hundred dollars of taxable property in the city of Shreveport, but of sufficient amount to fully pay relators' judgment, interest, and costs," &c. (Record, p. 7.)

From this judgment a writ of error was allowed to operate as a *supersedeas*. (Record, p. 11, April 25, 1885.)

Assignment of Errors.

First. The court erred in assuming and exercising jurisdiction.

Second. The court erred in refusing to quash.

Third. And in overruling the motion for recusation.

Fourth. No right to the mandamus to enforce the judgment existed, because in the ordinance enacting and incurring said indebtedness no provision was made to pay principal and interest of same by *levy of taxation.*

Fifth. That the relators have mistaken their remedy to enforce their judgment.

Argument.

I.

On the *first assignment of error* "the court erred in assuming and exercising jurisdiction." The brief in No. 377, City of Shreveport *vs.* Jacobs & Smith, is full, and dispenses from any further discussion of this particular question. The decision in that case upon this point will be conclusive in this.

II.

The *second assignment of error*—the court erred in refusing to quash—raises the question, Are mandamus proceedings in the name of the United States to be carried on in the national courts according to the mode and form of the varying laws of procedure of forty-six States, or are they to be made uniform throughout the Union? Is "the alternative writ" abolished by act of Congress, or has the whole subject of mandamus been left to State legislation as to law and fact?

III.

The *third assignment of error* reads, "and in overruling the motion for recusation." The nature of this motion is simply dilatory, and not to prevent or defeat. Its assignment of error is therefore strictly in order. "To deny any of these dilatories where of right the court ought to grant them, is error."

8 Coke, 117, Beecher's case.

Dimes *vs.* Grand Canal Co., 3 H. L. C., 795 (1852).

We start, then, with the fact that the district judge did not sit in the trial on the merits, because, "having been of counsel for one or the other party," he was recused. And as this mandamus proceeding is merely an auxiliary to the original suit, "the same reason and failing" (? probably failure to sit) "should apply now, and the aforesaid Judge A. Boarman should recuse himself." (Record, page 5.)

The defence to the motion is not a denial of the fact that the district judge had been of counsel for one or the other party, but rather by confession and avoidance. "If, in fact, I was once attorney for one or the other party, and had been regularly and properly recused on the trial of the merits, and the circuit judge in pursuance thereof had been brought in and had tried the case, still I am now merely called on to execute that judgment; and, therefore, the reason for my former recusation no longer applies."

This may be good law, and probably is, in many cases, for Lonque's Louisiana Digest, p. 607, *virbo Recusation*, par. 7, says:

"Although the judge recused himself properly on the trial of the merits, yet he must try a rule afterwards taken, where he is not personally interested, nor related to the parties interested, nor been *employed or consulted as an advocate.*"

29 Annual, *N. R.*, (not reported,) Succession Pinaud.

The principle enunciated is carefully and wisely limited. But here may be quoted, as the undoubted law of this case, what was said by the Supreme Court of Louisiana in a closely-allied case, State *ex rel.* Kneeland *vs.* City of Shreveport, 29 La. An., 659, at top: "Under the judgment, the rights of plaintiff are fixed, irrevocable, undisputed. How shall the judgment be executed? How shall his rights be enforced? So far as concerns the validity of the claim, it is evident that we cannot look behind the judgment, but, as it does not provide for its own execution, it is as evident, to supply that omission, we must refer to *the parties' contract*, to the *ordinance* which *authorized that contract.*"

The contract forming the foundation of the judgment in No. 377 is on that record, page 13. It appears therein that Aleck Boarman is one of the witnesses.

A peremptory mandamus leads necessarily to implicit obedience to its command *under pain of attachment for contempt of court.* The delicate nature of its exercise has often been commented on. The task would doubtless be very distasteful even for one of your honors when engaged in official duty on the circuit, R. S. U. S., 606, of sending your fellow citizens to jail for not taxing their municipality to pay principal and interest on railroad and other bonds. That famous outbreak of legislative power in the several States could not have happened in Connecticut or Massachusetts. (Bloomfield *vs.* National Bank, 121 U. S., 121.)

If, therefore, the recusation was because of the relation of attorney and client between the district judge and the mayor and trustees of Shreveport, the reasons for it were far more peremptory in the mandamus case than on the trial of the merits; *a fortiori*, if he ever was attorney for Jacobs & Smith. The whole spirit of R. S. U. S, 713, is opposed to all such judicial action.

IV.

The basic allegation of the original petition, Record, 377, page 2, by which it is sought to obtain entrance for this action into the federal circuit court is "that the law of the State of Louisiana, so far as same had any bearing on or relation to said contract between them and the said city and to the rights and obligations therefrom resulting, was by operation of law impliedly part of said contract" Whilst this must be admitted as an indubitable principle of law in the sphere of contract especially, it is equally as clear, plain, and incontestable that if the law of the

contract be expressed therein and dissonance exist between what is thus expressed and thus implied, the latter must yield to the former. *Expressum facit cessare tacitum.* "As a general rule where parties have entered into written engagements with express stipulations it is manifestly not desirable to extend them by any implications; the presumption is, that having expressed some they have expressed all the conditions by which they intend to be bound by that instrument." (Brown's Maxims, 506.)

We are thus brought to our *fourth assignment of error.*

V.

Now the contract sued upon here is based upon the statute of March 9, 1869, session acts of Louisiana, 1869, page 139, number 109. Its *first* section grants power to Shreveport to * * macadamise or otherwise improve and adorn the streets * * or wharves, and power to levy and collect a special *ad valorem* tax on the real estate fronting or adjacent to the street * * to be paved or otherwise improved.

Section *second.* Owners to pay two-thirds thereof (the city one-third.)

Section *third.* After contract awarded mayor and trustees shall provide for an equitable assessment to be made of all real estate subject to taxation for the improvement under contract.

Section *fourth* confers authority on mayor and trustees to collect, by law the assesment with interest at eight per cent. with privilege upon the property.

The city of Shreveport is the pupil, minor, or ward of the State, and with it the State's legislative power can do exactly what it pleases, regardless of its size or population. Behind every city stand the citizens who pay the taxes. Whoever contracts with a city, "knows or ought to know what is the quality of the person with whom he contracts." (Ulpian, Paud. 50, 17. *De Diversis Regulis.*) "Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract in reference to them." (Mumma *vs.* Potomac Company, 8 Peters, 287.)

Now, the contract here points out clearly the way the city was to make performance, *i. e.*, to pay the money due for the work. The payments were "to be made by the said city and by the owners of the property fronting on said street in their respective proportions according to the statute; that is, the said owners shall pay for their respective share or proportion of said work according to said statute, and the said city agrees and promises to pay the sum due by said city in accordance with said statute in and with the funds and proceeds arising from the collection of the wharfage dues at the wharf or wharves in said city." (See Contract, Record, 377, page 13.)

The statute definitely provided a sure way for the payment of the work, two-thirds by front proprietors, one-third by the city.

The city tax payers as a body could not, under the statute, be made liable to pay for more than one-third under any circumstances; and the judgment being the amount of wharfage due the city of Shreveport (and hence not yet collected) merges the right to recover anything whatever from the tax payers by *levy of taxation.*

The statute is "the measure of the power." Shreveport was totally without right to pledge the wharfage dues to pay for the macadamising. "This is too obvious to require argument." And if it be said in reply: "but we have a judgment against you for the wharfage," then you have mistaken your remedy. Whilst you are without right to tax our citizens collectively to pay you on this overdue wharfage; and even if we had already collected wharfage to the full amount of your judgment, your sole remedy, if you have any at all, is to obtain a specific performance of the contract by the city, by compelling them to repair their wharves and collect wharfage. There can be no doubt of this position; for the petition itself alleges "that it was understood and so expressed in said contract that for said work payment would be made by said city and by owners of property fronting on Commerce street in proportion fixed by said act No. 109, but that by their said contract the city obligated itself to pay or cause to be paid the entire sum which might become due to petitioners for work done on said contract."

This allegation seems to be *true in fact*, for the contract reads "that the true intent and meaning of the above promises on the part of the city is that said city in good faith *guarantees* and *warrants* the payment of *the whole entire sum* due to said contractors for all the work done in accordance with this agreement," &c., &c. But the statute nowhere authorizes the city to *guarantee* and *warrant* anything of the sort.

State Bank *vs.* Orleans Navigation, 3 La. An., 294.

By their very contract they abandoned the statute passed for their benefit, and waived all right to enforce payment for their labor by a direct tax upon the tax-payers in general. What plaintiffs have lost they voluntarily relinquished.

Bank of Columbia *vs.* Okeley, 4 Wheat., 244.

The statute No. 109 is eminently a law for the preservation of public order, from which individuals cannot derogate by their conventions. Contracts in violation of such laws cannot be ratified. *Fortior et potentior est dispositio legis quam hominis.* (3 La. An., 294, *ut supra.*) See Louisiana Code, article 11: In its integrity it reads thus: "Individuals cannot by their conventions derogate from the force of laws made for the preservation of public order or good morals. But in all cases in which it is not expressly or impliedly prohibited they can renounce what the law

has established in their favor, when the renunciation does not affect the right of others and it is not contrary to the public good."

Here the renunciation of the city's right to tax for the macadamising of the street, so far as their one-third aliquot part thereof is concerned, was expressly renounced in the contract, and this right had been established *by the law* in favor of Jacobs & Smith. They sue now *in affirmance of their contract.* By what process of law or of argumentation can they get this renounced right back again?

But the creditors may say, "at the time of our renunciation we took the guaranty and warranty of the city for the payment of the whole sum due for all their work." The contract so reads, but in law this paragraph is as if not written. After the front proprietors on both sides of the street had paid their share in full for the improvement, how could they be again taxed to pay more? And where is the authority for the guaranty? They then say: "But we have the pledge of the wharfage for securing our debt." Admitting this, *a. g.*, still they are not sueing to sell the pledge or to convert it into money, but to recover the fruits of the pledge. But they do not prove that any part of the fruits are in our hands. On the contrary, the record shows that we have not collected any part of them. Certainly in this form of action there can be no recovery for wharfage not collected. But the answer here is more explicitly, Where is the authority in Shreveport to make the pledge? Louisiana Code, 3117–3150, says: "The property of cities and other corporations can only be given in pledge according to the rules and subject to the restrictions prescribed on that head by their respective acts of incorporation." Here all allegation and proof of authority to pledge are absolutely wanting. *De non apparentibus et de non existentibus eadem est lex.* The guaranty of the whole debt, as well as the pledge, is simply void.

It is in many respects like the case of the Bank *vs.* Navigation Company *ut sup*, and the same general principles of law are applicable to both. Whether or not the petitioners may have some remedy *ex æquo et bono* to collect that portion of the paving which the city and the taxpayers may possibly still owe, is a question also alluded to in the cited case, but here as there, "to what extent we have not the means before us of determining. We can only decide that they do not establish a right in the plaintiffs to recover in this case."

Respectfully submitted,

CHARLES W. HORNOR,
Attorney for City of Shreveport.

WASHINGTON, D. C., *March* 7, 1888.

Supreme Court of the United States.

OCTOBER TERM, 1888.
No. 106.

THE CITY OF SHREVEPORT, PLAINTIFF IN ERROR,

vs,

BENJAMIN JACOBS AND JOSEPH B. SMITH.

In Error to the Circuit Court of the United States for the Western District of Louisiana,

Brief of Defendants, in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.
No. 106.

THE CITY OF SHREVEPORT, PLAINTIFF IN ERROR,

vs,

BENJAMIN JACOBS AND JOSEPH B. SMITH.

In Error to the Circuit Court of the United States for the Western District of Louisiana,

Brief of Defendants, in Error.

On May 3, 1871, Jacobs & Smith entered into a written contract with the City of Shreveport, by which they agreed to grade and macadamize a certain street in said city at a specified price per cubic yard. One-third of the cost was to be borne by the own-

ers of lots abutting on said street, and the balance by the city. To secure the contractors, and to pro vide a fund out of which they should be paid, the City of Shreveport pledged to said contractors all of the wharfage dues to be collected by it from steamboats for the use of the city wharf.

The abutting owners paid their one-third, under the terms of the contract, and for several years the wharfage dues were collected and paid over by the City to the contractors. From and after Dec. 20th, 1878, the owners of steamboats refused any longer to pay wharfage, on the ground that no sufficient wharf or other facilities were afforded them. The City officials, adopting the theory that the funds arising from the collection of wharfage would go to the contractors Smith & Jacobs, and for several years at least would not benefit the City, declined to repair or make a wharf, and refused and neglected to take any steps to compel the payment of wharf dues by the boats.

After waiting seven years without receiving one cent on the balance due them by the City under the contract, and without being able to arrive at any settlement or adjustment of same, this suit was brought.

The amount of the balance due plaintiffs under

the contract of the City was $47,466.31, but the verdict of the jury and the judgment of the court was only for $13,249.30. This last sum being the amount of wharfage dues which were proven on the trial to have accrued between Dec. 20, 1878, and the date of the suit, but which the City had failed and refused to collect.

No bill of exception was taken in the lower court to the ruling of the Court upon any point, nor to the charge to the jury, and no motion for a new trial was filed. This writ of error was sued out and citation made just two years, lacking one day, after the verdict and judgment, and then only after mandamus proceedings had been instituted by plaintiffs to enforce the levy of a tax to pay the judgment.

It would be an easy task to show the utter fallacy of the position taken by the City in defense of the suit on the merits, but as it is clear that, as the case is presented before this Court, no such question can be gone into, we will not attempt it.

We will add, however, on this point, that there is nothing whatsoever in the contract between Jacobs & Smith and the City, to justify the allegation that the contractors bound themselves to look *alone* to the wharfage dues for payment for their work done under the contract. On the contrary

the contract itself contains this express provision: "Further, it is agreed and understood that the true intent and meaning of the above promises on the part of the City, is that said City in good faith guarantees and warrants the payment of the whole and entire sum due to said contractors for all the work done in accordance with this agreement." See Transcript record, page 13.

The wharfage dues were simply pledged and indicated as one of the means of payment, and it was doubtless in the contemplation of both parties to the contract, at the time, that they would prove sufficient, in ~~four~~ a few years to pay off the whole debt, but the City was not thereby absolved from its indebtedness under its contract, nor from its general obligation to provide for its payment by taxation or otherwise.

To illustrate, let us take the facts as they now exist. Shortly after this case was decided in the Circuit Court, the City made a test case and brought suit in the State Court to enforce its claims for wharfage against a steamboat line for wharfage dues of one year. This case, Shreveport vs. Coast Line, 37th La. Annual Reports, 562, was decided in May, 1885, by the Supreme Court of the State. It was there held that the City of Shreveport had no

wharf, or wharfage facilities, and had no legal right to charge for same. Under the theory adopted by its counsel the City now stands forever released from its obligations to pay Jacobs & Smith for the work done by them in improving its streets. Such a proposition doe not admit of argument.

As above stated, this case is open for review in this Court only upon one point. and that is the question of jurisdiction, and we presume that this is the only point which will be urged here by counsel for the City.

The jurisdictional question here involved is important and, we beleive, has never, in the shape here presented, been before this Court.

The opinion of the Judge of the lower Court in overruling the plea to the jurisdiction is not found in the record, for the reason that he had very recently decided identically the same question, and in so doing had filed a lengthy and exhaustive written opinion. In sustaining his jurisdiction here he contented himself with referring to his opinion in that case, Sawyer vs. Concordia parish, 12 Federal Reports, 754, adopting it as his opinion in this. As the opinion of the District Judge in that case is an able and elaborate one, and fully presents and covers all that we could possibly urge in this, we

desire,by reference,to incorporate it as a part of this brief. We refer to it, not as authority, but as an able, clear and exhaustive argument in support of the Court's jurisdiction in this case, and as such we we respectfully commend it to the attentive consideration of this Honorable Court.

The remedy subsisting in a State when and where the contract is made, and is to be performed, is a part of its obligation; and any subsequent law of the State, which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution of the United States, and, therefore, void. Edwards vs. Kenzy, 96 U. S., 595; Van Hoffman vs. Quincy, 4 Wallace, 535.

The remedy enters into and forms a material part of the obligation of a contract, and a statute, or provision of a State constitution, which impairs the remedy, or lessens its efficiency, is prohibited by the constitution of the United States. Walker vs. Whitehead, 16 Wallace, 314; Louisiana vs. New Orleans, 102 U. S., 203; Nelson vs. St. Martins parish, 111 U. S., 716.

To show the inconsistency as well as insincerity of defences set up in behalf of the City, we refer the Court to this solemn allegation of their excep-

tion and plea to the jurisdiction in this case, (Transcript, page 6.) "That there is no law, ordinance, or constitutional provision in Louisiana which would impair the obligations of the alleged contract between plaintiffs and defendants, and no probability of the courts of the State throwing any obstacle in the way of the execution of a judgment in their favor, if one should be obtained. On the contrary, all the State courts, from the highest to the lowest, in numerous decisions have held that the constitutional limitation of municipal taxation does not apply to contracts entered into prior to the adoption of the constitution of 1879, *which this is admitted to be.*"

And yet when this judgment was sought to be enforced, we find this defence specifically urged in the answer of the City to the mandamus proceeding: "Further answering respondent alleges that *under the State constitution defendant is limited in its power of taxation to* 10 *mills on the dollar, which limit has been reached, and therefore, for the reasons set forth herein defendant cannot be forced to levy a tax as prayed for.*" See Transcript of record in suit No. 107 of the docket of this Court, page 6, entitled Andrew Currie, Mayor and others vs. The United States ex rel., Benjamin Jacobs and Jos. B. Smith.

In other words, when seeking to oust the Circuit Court of jurisdiction, they specifically admit that this contract was entered into prior to the adoption of the constitution of 1879, which limits municipal taxation to ten mills; that consequently such limitatien could not impair its obligations; that the City would not attempt so idle and vain a thing as to set up such constitutional limitation, to protect itfelf from the levy of a special tax to enforce the judgment, and finally that if it did set up any such defence, the State court would not allow it, but would itself enforce the Federal constitutional inhibition against the impairment of the obligation of a contract. But we find when this judgment is sought to be enforced by the levy of a tax, this same constitutional limitation of taxation is gravely pleaded even in the United States Circuit Court. Comment is useless.

We respectfully submit that the judgment of the lower court should be affirmed.

T. ALEXANDER,
N. C. BLANCHARD,
Attorneys for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1888.
No. 107.

ANDREW CURRIE, MAYOR, ET AL. PLAINTIFFS IN ERROR,

vs,

THE UNITED STATES, EX. REL., BENJAMIN JACOBS AND JOSEPH B. SMITH,

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Brief of Defendants.

Supreme Court of the United States.

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vs,

THE UNITED STATES, EX. REL., BENJAMIN JACOBS AND JOSEPH B. SMITH,

In Error to the Circuit Court of the United States for the Western District of Louisiana,

Brief of Defendants.

I. Instead of issuing an alternative writ of mandamus, it is equally proper for the Court to grant a rule to show cause. High's Extraordinary Legal Remedies, section 503.

This is frequently done in the United States

Courts. Commissioners of Knox Co. vs. Aspinwall, 24 Howard, 376; United States vs New Orleans, 8 Otto, (98 U. S.) 381.

It is also proper under the practice of the Louisiana Courts, Savage vs Holmes, 15 La. Annual, 334; Morris vs Womble, sheriff, 30 La. Annual, 1312.

II. In a *mandamus* proceeding to enforce collection of a judgment against a municipal corporation, the judgment itself cannot be impeached collaterally. The respondents are concluded by the judgment at law. They can not go behind it to raise any question touching the sufficiency of either of the causes of action upon which it was rendered. Supervisors vs the United Sates, 4 Wallaec, 435; Mayor vs Lord, 9 Wallace, 409; United States vs New Orleans, 8 Otto, (98 U. S.) 381; Nelson vs. St. Martins parish, 111 U. S, 716. High on Extraordinary Legal Remedies, section 396.

III. When at the time a debt was contracted there existed no limitation on the rate of taxation by a municipal corporation, any subsequent legislative repeal or modification of the taxing power, so as to deprive the holder of the contract of all adequate and efficacious remedy,is

within the inhibition of the constitution. Van Hoffman vs City of Quincy, 4 Wallace, 535; Wolff vs New Orleans, 103 U. S., 358; Ralls Co. vs United States, 105 U. S.; 733; Nelson vs St. Martin's parish, 111 U. S., 716.

This is a mandamus proceeding to enforce collection of a judgment rendered by the United States Circuit Court against the City of Shreveport, in favor of Benjamin Jacobs and Joseph B. Smith. The judgment had been rendered nearly two years previous to the institution of the mandamus proceedings, nothing had been paid on it, execution had been issued and returned *nulla bona*, and the City Council had refused to levy any tax for its payment.

The proceedings were all formal and regular and none of the objections raised by counsel for the City are worthy of discussion. In fact the motion was brought before this Court simply as a makeshift, to gain time to bring up on writ of error the original judgment, with a view to its reversal. The two were filed together, that being given the number just preceding this.

Objection in the shape of a motion to quash

the writ, was made that no *alternative* writ of mandamus was issued.

The practice followed by counsel for the applicants for the writ was the usual one, of a *rule to show cause* why a peremptory mandamus should not issue. This has been held to be the correct practice in both the State and Federal Courts. Commissioners of Knox Co. vs Aspinwall, 24 Howard, 376; United States vs New Orleans, 8 Otto (98 U. S.) 381. Savage vs. Holmes, 15 La. Annual Reports, 334; Morris vs Womble, Sheriff, 30 La. Annual Reports 1312. See also High's Extraodinary Legal Remedies, sec. 503.

It is too well settled to admit of discussion, that in a mandamus proceeding respondents are concluded by the judgment at law, and cannot raise any question touching the correctness of the judgment sought to be enforced, or the sufficiency of the cause of action upon which it is based. Supervisors vs United States, 4 Wallace, 435; Mayor vs Lord, 9 Wallace, 409; United States vs New Orleans, 98 U. S., 381; Nelson vs St. Martin's parish 111 U. S., 716; High on Mandamus, sec. 396.

All other obejctions raised by respondents in their answers are covered and concluded by the original judgment. As said by this Court in United

States vs New Orleans, 98 U. S., 381. "The indebtedness of a city is conclusively established by a judgment recorded against it in a court of competent jurisdiction; and in enforcing payment, the plaintiff is not restricted to any particular property or revenues, or subject to any conditions, unless the judgment so provides."

As to the limitation upon taxation, imposed by the State constitution, which is pleaded in the answer, it suffices to say that the contract and indebtedness upon which the judgment is based, was made long anterior to the adoption of the State constitution of 1879.

It has long been settled that as long as a City extsts, all State laws, whether in the form of a statute or constitutional provision, which withdraws or restricts her taxing powers so as to impair the obligations of her contracts, are absolutely void. Van Hoffman vs City of Quincy, 4 Wallace, 535; Wolff vs New Orleans, 103 U. S., 358; Ralls Co. vs United States, 105 U. S., 733; Nelson vs St. Martin's parish; 111 U. S., 716.

The judgment of the lower Court is correct, and we respectfully submit, should be affirmed.

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